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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN HALL individually and on
behalf of others similarly situated

Plaintiffs,

v.

WESTERN DENTAL SERVICES,
INC.

Defendant.

Case No: '14CV1776 DMS JMA

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF
PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §
227, et seq.**

JURY TRIAL DEMANDED

INTRODUCTION

1. KEVIN HALL (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of WESTERN DENTAL SERVICES, INC. (“Defendant”), in negligently or intentionally contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.
2. The TCPA was designed to prevent calls and messages like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).
3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

1 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012
 2 WL 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on
 3 TCPA's purpose).

4 4. Congress also specifically found that “the evidence presented to the Congress
 5 indicates that automated or prerecorded calls are a nuisance and an invasion
 6 of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also, *Mims*,
 7 132 S. Ct. at 744.

8 5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA
 9 case regarding calls to a non-debtor similar to this one:

10 The Telephone Consumer Protection Act ... is well known for
 11 its provisions limiting junk-fax transmissions. A less-litigated
 12 part of the Act curtails the use of automated dialers and
 13 prerecorded messages to cell phones, whose subscribers often
 14 are billed by the minute as soon as the call is answered—and
 15 routing a call to voicemail counts as answering the call. An
 16 automated call to a landline phone can be an annoyance; an
 17 automated call to a cell phone adds expense to annoyance.

18 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012).

19 JURISDICTION AND VENUE

20 6. This Court has federal question jurisdiction because this case arises out of
 21 violation of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*,
 22 132 S. Ct. 740 (2012).

23 7. Venue is proper pursuant to 28 U.S.C. § 1391 for the following reasons: (i)
 24 Plaintiff resides in the County of San Diego, State of California which is
 25 within this judicial district; (ii) the conduct complained of herein (unsolicited
 26 autodialed phone calls to Plaintiff's cellular phone) occurred within this
 27 judicial district, as Plaintiff and his phone are located in San Diego,
 28 California; and, (iii) Defendant conducted business within this judicial district
 at all times relevant by calling Plaintiff cell phone, and operating offices
 within San Diego County.

PARTIES

8. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the County of San Diego, State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).
9. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times mentioned herein was, a corporation whose State of Incorporation and principal place of business is in the State of Indiana. Defendant, is and at all times mentioned herein was, a corporation and is a “person,” as defined by 47 U.S.C. § 153 (39).
10. Defendant is a dental service provider who has offices in San Diego County.
11. Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

12. Beginning in or around the Spring of 2014, Defendant began to utilize Plaintiffs’ cellular telephone number, ending in -0586, to place virtually daily incessant calls to Plaintiffs pertaining to another person whom Plaintiff does not know.
13. Plaintiff did not provide Defendant with his cellular telephone number.
14. During this time, Defendant placed calls on a daily basis, often placing numerous calls a day.
15. The ATDS used by Defendant has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.
16. The calls Defendant placed to Plaintiffs’ cellular telephone were placed via an “automatic telephone dialing system,” (“ATDS”) as defined by 47 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).
17. This ATDS has the capacity to store or produce telephone numbers to be dialed, using a random or sequential number generator.

18. The telephone number that Defendant, or its agents, called was assigned to a cellular telephone service for which Plaintiffs incur a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).

19. These telephone calls constituted calls that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

20. Plaintiffs have never provided any personal information, including their cellular telephone number to Defendant for any purpose. As such, neither Defendant nor its agents were provided with prior express consent to place calls via its ATDS to Plaintiffs' cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).

21. These telephone calls by Defendant, or its agents, violated 47 U.S.C. § 227(b) (1).

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated ("the Class").

23. Plaintiff represents, and is a member of the Class, consisting of:

All persons within the United States who received any telephone call/s from Defendant or its agent/s and/or employee/s to said person's cellular telephone made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

24. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know the number of members in the Class, but believes the Class members number in the hundreds of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

25. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the following ways: Defendants, either directly or through its agents, illegally contacted Plaintiff and the Class members via their cellular

1 telephones by using an ATDS, thereby causing Plaintiff and the Class
2 members to incur certain cellular telephone charges or reduce cellular
3 telephone time for which Plaintiff and the Class members previously paid,
4 and invading the privacy of said Plaintiff and the Class members. Plaintiff
5 and the Class members were damaged thereby.

6 26. This suit seeks only damages and injunctive relief for recovery of economic
7 injury on behalf of the Class, and it expressly is not intended to request any
8 recovery for personal injury and claims related thereto. Plaintiff reserves the
9 right to expand the Class definition to seek recovery on behalf of additional
10 persons as warranted as facts are learned in further investigation and
11 discovery.

12 27. The joinder of the Class members is impractical and the disposition of their
13 claims in the Class action will provide substantial benefits both to the parties
14 and to the court. The Class can be identified through Defendants' records or
15 Defendants' agents' records.

16 28. There is a well-defined community of interest in the questions of law and fact
17 involved affecting the parties to be represented. The questions of law and fact
18 to the Class predominate over questions which may affect individual Class
19 members, including the following:

- 20 a) Whether, within the four years prior to the filing of the Complaint,
21 Defendant made any call/s (other than a call made for emergency
22 purposes or made with the prior express consent of the called party) to
23 Class members using any automatic telephone dialing system or an
24 artificial or prerecorded voice to any telephone number assigned to a
25 cellular telephone service.
- 26 b) Whether Defendant can meet its burden of showing it obtained prior
27 express consent (i.e., consent that is clearly and unmistakably stated);
- 28 c) Whether Defendant's conduct was knowing and/or willful;

d) Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and

e) Whether Defendants and its agents should be enjoined from engaging in such conduct in the future.

29. As a person that received at least one telephonic communication from Defendant's ATDS without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

30. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the Defendants' unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy and Defendants will likely continue such illegal conduct. Because of the size of the individual Class member's claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein.

31. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

32. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendants to comply with federal and California law. The interest of Class members in individually controlling the prosecution of separate claims against Defendants is small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

33. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

COUNT I

**NEGLIGENT VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

47 U.S.C. 227

34. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

35. The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

36. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq, Plaintiff and The Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

37. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

COUNT II

**KNOWING AND/OR WILLFUL OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

47 U.S.C. 227

38. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

39. The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

40. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq, Plaintiff and The Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

41. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and The Class Members pray for judgment as follows:

- Certifying the Class as requested herein;
- Providing such further relief as may be just and proper.

In addition, Plaintiff and The Class Members pray for further judgment as follows:

COUNT I FOR NEGLIGENT VIOLATIONS OF THE (TCPA), 47 U.S.C. 227 ET. SEQ.

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

COUNT II FOR KNOWING/WILLFUL VIOLATION OF THE (TCPA), 47 U.S.C. 227 ET. SEQ.

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

42. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully submitted,

Hyde & Swigart

Date: July 28, 2014

By: /s/Joshua B. Swigart
Joshua B. Swigart
Attorneys for Plaintiff

[ADDITIONAL PLAINTIFF'S COUNSEL]

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